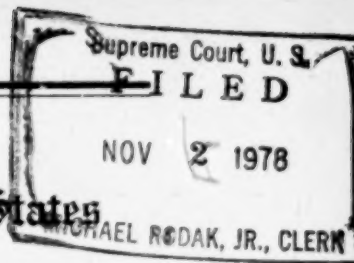


IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. ....**78-738**



KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD  
LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF,  
MATSUO TAKABUKI, MYRON B. THOMPSON, Trustees  
of the Bernice P. Bishop Estate; HAWAII-KAI  
DEVELOPMENT CO.,

*Petitioners,*

— vs. —

UNITED STATES OF AMERICA,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

Petitioners Kaiser Aetna, Hawaii-Kai Development Co., and the individual Trustees of the Bernice P. Bishop Estate<sup>1</sup> respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 11, 1978.

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<sup>1</sup> In this Petition, Kaiser Aetna and Hawaii-Kai Development Co. will be referred to collectively as "Kaiser Aetna", and Bernice P. Bishop Estate and its Trustees will be referred to collectively as "the Trustees".

### Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United States District Court for the District of Hawaii, reported at 408 F. Supp. 42 (D. Haw. 1976), appears in the Appendix hereto.

### Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 11, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### Questions Presented

1. Whether the Ninth Circuit Court of Appeals erred in holding Kuapa Pond, a uniquely private body of water, a "navigable water of the United States" subject to a federal public navigation servitude?
2. Whether the Ninth Circuit Court of Appeals erred in finding federal regulatory authority over navigable waters and the right to mandate free public access inseparable?
3. Whether the imposition of a public navigation servitude in these circumstances constitutes a taking of private property without just compensation contrary to the fifth amendment to the United States Constitution?

### Constitutional and Statutory Provisions Involved

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

United States Const., amend. V.

That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established as hereinafter provided.

Organic Act, § 95, codified as 48 U.S.C. § 506.

That any person who claims a private right to any such fishery shall, within two years after the taking effect of this Act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

That if such fishing right be established the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated.

Organic Act, § 96, codified as 48 U.S.C. § 507.

The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Act of July 7, 1898, 30 Stat. 750-51.

All fisheries in the sea waters of the State not included in any fish pond or artificial inclosure shall be free to the public, subject to vested rights and the right of the State to regulate the same.

Hawaii Const., art. X, § 3.

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other

water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403, Section 10, Rivers and Harbors Act of 1899.

#### Statement of the Case

Kuapa Pond, one of at least one hundred forty-two Hawaiian fish ponds of prehistoric origin, is a unique example of private property. The people of Hawaii have regarded fish ponds as private property for centuries with the right to exclude all others from as early as 1350. The Corps of Engineers presently seeks to disregard these private property rights by declaring the pond a "navigable water of the United States," subject to the imposition of a federal public navigation servitude.

The Hawaiian Kingdom invariably dealt with fish ponds as part of the dry land, a portion of the private property of the regional chiefs. In 1848, King Kamehameha III pronounced the Great Mahele, or national land distribution, to dissolve feudal land holdings. Fish ponds were distributed with adjacent fast lands, and titles to fish ponds were recognized to the same extent and in identical manner as the fast lands. Ownership of the pond by the

Trustees dates from a Royal Patent issued pursuant to the Great Mahele.

The pond originally covered 523 acres and extended approximately two miles inland from adjacent Maunalua Bay, an arm of the Pacific Ocean. It was characterized by shallow waters and separated from adjacent ocean waters by a permeable natural sandbar reinforced with stone walls. It had two narrow openings to Maunalua Bay, in which were placed sluice gates to prevent the mullet raised in the pond from escaping to the open sea. Boat travel to the open sea was not possible due to the barrier beach formation. The pond remained in this state until it and the surrounding fast lands began to be developed in 1961 pursuant to an agreement between Kaiser Aetna and the Trustees granting master development rights to 6,000 acres now popularly known as Hawaii Kai.

The agreement specifically pertaining to Kuapa Pond never contemplated public access and was subject to a declaration of protective provisions granting each lessee of a marina lot a non-exclusive easement for purposes of navigation and access to the sea, together with the Trustees and others to whom the Trustees grant licenses and permits.

Access to the pond has been reserved to waterfront lot lessees and boat owners paying an annual fee. The public has always been excluded. No suggestion of the applicability of a public navigation servitude arose until Kaiser Aetna had invested substantial funds developing the pond and the surrounding areas with amenities suitable for small pleasure boating. Kuapa Pond remains today what it has been throughout Hawaiian history, private property, and for all legal purposes the equivalent of fast land.

At present, approximately 668 recreational boats are authorized to use the pond. Maintenance financing is accomplished by collection of an annual \$72.00 fee from approximately 1,500 marina lot lessees, 86 non-marina lot lessees, and 56 nonresident boat owners. Maintenance is coordinated by Kaiser Aetna. Commercial use has not been permitted, with a minor exception of one small passenger vessel used for a brief time to promote residential sales and attract visitors to a regional shopping center.

The right to improve Kuapa Pond by creating a privately controlled marina-style residential community is integrally related to Kaiser Aetna's long-range comprehensive plan for housing, educational and recreational opportunities. A decade of carefully planned development has yielded a marina-style residential community of approximately 22,000 persons. The Corps of Engineers has been aware at all times of the dredging and filling operations in and contiguous to the pond, and never required permits or purported to have any regulatory authority until the early 1970's. The Corps had consistently listed the pond as a private marina.

Development pursuant to the master plan did not destroy the inherent characteristics of the pond. Adjacent lands were graded, the pond was dredged and filled, but the barrier beach, reinforced early in this century to support a roadway, still exists. Although the pond has been dredged to a depth of six to eight feet, and the opening to the bay improved so pleasure boating is now possible, the appearance, size and character of the pond is not radically dissimilar to circumstances prior to these activities.

As a result of the above-described conflict, the Army Corps of Engineers sought declaratory judgment in federal court in the District of Hawaii to establish regulatory

authority under § 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1970) and an injunction granting public access to Kuapa Pond. The District Court upheld regulatory jurisdiction but denied the injunctive relief. Both parties appealed. The Ninth Circuit Court of Appeals affirmed the District Court's finding of regulatory jurisdiction, but reversed its denial of injunctive relief. Jurisdiction in both courts below was invoked because the questions arose under the federal Rivers and Harbors Act.

### Reasons for Granting the Writ

1. The Circuit Court erred in finding Kuapa Pond a "navigable water of the United States" for purposes of imposition of a federal navigation servitude.

The term "navigable waters of the United States," employed traditionally to identify waters subject to federal regulation and admiralty jurisdiction, is so inherently unworkable with regard to Hawaiian fish ponds that it does not represent a meaningful or equitable standard under which public and private rights may be determined. The historical designation is legally unsupportable when applied to waters which have been recognized to be private by the express and unambiguous acts of Congress. At least one hundred forty-two fish ponds exist in modern Hawaii; the impact of this decision is potentially far-reaching.

Despite development activities resulting in internal modifications, the status of the pond remains unchanged, that is, the pond is still a fish pond, and as such is still private property. The controlling principle was expressed succinctly in Hawaii Attorney General's Opinion 57-159 (Dec. 12, 1957). "Until it becomes judicially established

that title to such private property [fish ponds] has been lost by the owner thereof by adverse possession, prescription and erosion . . . or some other legal means, the fishpond remains private property." *See also Application of Kamakana*, 58 Haw. Adv. No. 5860, 574 P.2d 1346 (1978), wherein the State of Hawaii's claim by adverse possession to a privately held fish pond was denied, and the court held legal title, equivalent to title to fast lands, to remain with the private landholder. The owners have never abandoned, transferred, conveyed or otherwise given up any title to the pond.

To a certain extent the Government admits to the continued existence of the pond *qua* pond. With significant inconsistency the Government denies private status, arguing the pond had been destroyed by development work, while at the same time admitting that petitioners have a continuing right to exclude the public from fishing or from acting in any manner that might interfere with the exclusive right to fish. This inconsistency results from a fundamental misapprehension of the vested right to title existing at the moment of Hawaiian annexation by the United States.

The District Court properly found Kuapa Pond never to have been "servient to any 'navigation servitude,'" and held that its owners had the right to exclude the public.

The theory that the federal government holds a stewardship over all navigable waters in a United States territory prior to its being admitted to statehood . . . , may be valid for lands obtained from a foreign government where there is no history of legally authorized private proprietorship over certain waters therein. Where, just as here under the Hawaiian Kingdom, property rights have been estab-

lished by a government prior to purchase or annexation of the lands however, those private property rights survive if they are recognized in and by the instrument of annexation.

See p. 27a of Appendix hereto; 408 F. Supp. at 51-52. The Ninth Circuit improperly applied the designation, ignoring uniquely vested private property rights in the beds, banks, and waters of Kuapa Pond.

The District Court did not rely on state law to deny the public servitude. It simply recognized that rights of private property vested under a prior government survive annexation if, as here, they were recognized by the federal government upon annexation. The District Court properly cited *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891), wherein the United States had confirmed title to lands based on treaty against a claim based on a California grant. In that case, this Court discussed conflicting claims to reach the following conclusion:

It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. [Citations omitted.] Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory. . . . But this doctrine does not apply to lands that had been previously granted to other par-

ties by the former government, or subjected to trusts which would require their disposition in some other way. *San Francisco v. Le Roy*, 138 U.S. 656. For it is equally well settled that when the United States acquired California from Mexico by . . . treaty . . . , they were bound . . . to protect all rights of property in that territory emanating from the Mexican government previous to the treaty. [Citation omitted.]

Irrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same. [Citations omitted.]

These observations lead directly to the determination of the force and effect of the title of the pueblo of San Francisco, derived from the former government of Mexico, as opposed to the title which it insisted passed to the State of California upon its admission into the Union by virtue of its sovereignty over all tide lands in the State below the high-water line, even including such as are situated within the limits of the pueblo.

142 U.S. at 183-84 (emphasis added). See also *San Francisco v. Le Roy*, 138 U.S. 656 (1891). It is clear that titles derived from Mexico in these cases were valid against the United States and the State of California, as well as against other private parties. See *Knight*, 142 U.S. at 184, 188-89; *Le Roy*, 138 U.S. at 671.

The District Court held that only waters subject to the reservation of stewardship in favor of the federal government are available for the imposition of the public servitude. The Ninth Circuit, however, relying on the *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), to define the broad reach of the federal powers

over waters, viewed the present conflict as being between federal and local law. This misapprehends the facts. A conflict meriting Supreme Court resolution exists between federal laws developed by the Supreme Court and the Congress at various stages in our national development.

Critical to a proper analysis of *Appalachian* and other cases cited to support the Ninth Circuit opinion is recognition that the issues before those courts focused on the regulatory powers of the federal government, not the imposition of the public servitude. Courts have not addressed the primary issue herein—whether free public access necessarily follows in all circumstances where a federal regulatory power over navigable waters exists.

The Act of Congress annexing the Hawaiian islands recognized the unique property law system of the Hawaiian Kingdom and Republic, under which fish ponds were considered legally identical to dry land. Act of July 7, 1898, 30 Stat. 750-51. Thereafter, enacting comprehensive legislation for the governance of the new Territory, Congress repealed all prior rights in sea fisheries, *subject to vested rights*, but specifically protected fish ponds from any change in status.

That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the seawaters of the Territory of Hawaii *not included in any fish pond or artificial enclosure* shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established as hereinafter provided.

Organic Act, § 95, codified as 48 U.S.C. § 506 (emphasis added). Protection continued after Statehood with similar provisions in Article X, Section 3, of the Hawaiian Constitution.

Pre- and post-annexation decisions of the Supreme Courts of the United States and Hawaii confirm the unique status of the fish ponds. The Ninth Circuit improperly held that cases in Hawaiian courts were irrelevant, and the following Supreme Court decisions were disregarded altogether.

In *Damon v. Hawaii*, 194 U.S. 154 (1904), Justice Holmes wrote:

A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as *property and a vested right* than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, *however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.* (Citation omitted.)

194 U.S. at 158 (emphasis added). See also *Carter v. Hawaii*, 200 U.S. 255 (1906).

These cases establish that under Royal Patents and statutes and usage of the Hawaiian Kingdom vested rights in sea fisheries were created. The District Court correctly noted that these cases, while not involving fish ponds, do "constitute a federal recognition of peculiar rights arising out of Hawaii's unique feudal system of property rights."

The District Court therefore was correct in concluding Hawaiian fish ponds are private—not public—waters over which no public navigation servitude may extend.

Hawaiian case law is relevant to reinforce the proposition that fish ponds have never been regarded as other than private property. See *Haalelea v. Montgomery*, 2 Haw. 62 (1858) (when settling a dispute over a warranty deed given by High Chief Kekauonohi, sea fishing rights in the open waters were challenged, but title to the fish ponds were not); *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879) (settlement of a boundary dispute included assignment of various fish ponds among the parties); *Kapea v. Moehonua*, 6 Haw. 49 (1871) (in settling accounts the court mingled references to fish ponds, house lots and taro patches without distinction; rental fees for a fish pond were set); *Murphy v. Hitchcock*, 22 Haw. 665 (1915) (dealing with the lease of a fish pond as an estate for years in realty); *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968) (decree quieting title in an 18-acre fish pond and the surrounding area). Fish pond status is aptly summed up in the dictum of *Harris v. Carter*, 6 Haw. 195, 197 (1877):

... If a man sells his house-lot, the conveyance will be held to include the fountain or the garden which is in the house-lot.

So a grant of an Ahupuaa [Hawaiian land unit] will include the grantor's fishponds or kalo patches lying within the Ahupuaa.

This dictum has been reaffirmed recently by the Hawaii Supreme Court in *Application of Kamakana*, 58 Haw. Adv. No. 5860 at 7, 574 P.2d at 1350.

The private nature of Kuapa and similar ponds precludes the imposition of the federal public navigation servitude, and the Ninth Circuit decision granting public access is contrary to congressional and Supreme Court recognition of the existence of private waters over which the United States has retained no reservation.

2. A limited federal regulatory authority over activities in Kuapa Pond is separable from the imposition of the public navigation servitude.

The District Court recognized that the Corps of Engineers may have some regulatory powers under the Rivers and Harbors Act of 1899, Section 10, 33 U. S. C. § 403, over waters not subject to a public navigation servitude.

There is nothing inconsistent between the Hawaiian law of private ownership of fishponds and the federal power over navigation because the latter was merely a surrender of jurisdiction by the states of powers inherited from the Crown or acquired by the "equal footing" doctrine—only to the extent the states had jurisdiction over waters to surrender. The Kingdom of Hawaii never claimed jurisdiction over fishpond waters. (Citation omitted.)

See p. 27a of Appendix hereto; 408 F. Supp. at 52, n. 24.

Authority arguably exists to regulate dredging activity to insure against impairment of navigability in nearby Maunalua Bay. An appreciation of this potential explains Kaiser Aetna's efforts to cooperate following the Corps of Engineers' 1972 decision to require permits for dredging and related activities.

This regulatory authority can be analogized to zoning regulation where an owner's right to use land may be con-

trolled to further area-wide aesthetic, economic and social goals. Courts have extended zoning controls far beyond their original scope, but even in the area of historic preservation, an area in which the general public has demonstrated a particularly active interest, courts have not seen fit to declare buildings subject to regulation open to the public. *Cf. Penn Central Transportation Co. v. City of New York*, 46 U.S.L.W. 4856 (1978) (extensive zoning controls upheld).

Further, this honorable Court in the *United States v. Texas*, 339 U.S. 707, 718-19 (1950), recognized that "dominium and imperium are normally separable and separate. . . ." Therein the issues revolved around marginal seawater bed title, and the concept of separateness was rejected because of national responsibilities for shorelines abutting international waters. The outcome, however, does not defeat the importance of this Court's acknowledgment that proprietary rights and regulatory authority can co-exist without regulation swallowing up and obscuring that most dear quality of private rights, the right to determine who shall be permitted access.

An analogous question arose in connection with a proposal by the United States for a waterway from Utica, Illinois, to Lake Michigan. The United States wished to take over artificial waterways owned by the State of Illinois. The United States Attorney General rendered the opinion that no permission from Illinois was necessary for federal regulation and control of those portions of the waterway which were originally navigable streams, which the State had merely improved. However, as to those portions of the waterway which were entirely artificial, he concluded that Congress could provide for improvement and control of navigation, but that the State could not be

deprived without its consent of reasonable compensation for the use of its property. 36 Op. U.S. ATT'Y GEN. 203 (1930). In the words of the opinion:

Some parts of this system appear to be wholly artificial, constructed with State funds, and as to them the question arises whether the United States may take over complete possession and control of an artificial highway constructed by a State, and appropriate the State's investment without the payment to it of any compensation or consideration. It has been shown that notwithstanding a waterway is artificial and built by a State, commerce and navigation on it are subject to Federal regulation and control, and it is subject to the maritime and admiralty jurisdiction of the United States. *The authorities have not gone to the extent of holding that complete possession and control of such artificial waterways may be taken over from a State and the State deprived of its investment and of any return thereon without its consent.* It may be that Illinois, as owner of the canal property built in part with State funds, could charge reasonable tolls to vessels passing through them. In such case, no doubt, Congress could regulate the charges. (See 33 Op. 428.) It is not apparent that the State is in any worse position than a public-service corporation which builds an artificial waterway under a State charter. *Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within the admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owner, and deprive the latter of his investment or any return upon it.*

While this question is a novel one, I find nothing in the decisions of the courts to warrant the conclusion that powers of the Federal Government over artificial waterways extend that far.

*Id.* at 213-14 (emphasis added). The conclusion of the Attorney General in the foregoing opinion is perfectly consistent with a properly limited navigation servitude.

The Ninth Circuit's failure to cite any authority for the decree that regulatory authority and right to mandate public access exists inseparably is telling. The edict fails to withstand logical scrutiny because the existence of contrary Supreme Court decisions and Acts of Congress is ignored. This approach misses an opportunity to refine the scope of regulatory authority over waters in circumstances which demand it.

The effect of this decision reaches far beyond one isolated Hawaiian fish pond. In effect, the Ninth Circuit has given the Corps of Engineers carte blanche to establish public recreational water bodies where formerly a privately controlled residential marina-style environment existed. Without fanfare, and subsequent to significant improvement making Kuapa Pond more desirable, the Corps decided that revised 1972 regulations permitted them to exercise prerogatives over its waters, including transforming it to a public recreation area. It was not so designed and never so intended. Reposing such power in the Corps of Engineers or any other body, raises serious questions about future private property status in this country. Federal regulation and the right to public access can and must be separated if private property rights are to be respected.

3. Prohibiting Kaiser Aetna from maintaining controlled access to and monitoring activities in Kuapa Pond,

constitutes a taking of private property without compensation contrary to the fifth amendment to the Constitution.

According to ancient Hawaiian property law, Acts of Congress, decisions of this Court, and decisions of the Supreme Court of Hawaii, Kuapa Pond's ownership has been regarded as private property until the Ninth Circuit determined otherwise. The Ninth Circuit decision mandating public access is a poorly disguised confiscation of property, absent the employment of appropriate eminent domain procedures. Petitioner submits that this decision goes far beyond any regulation arguably within the powers of the Corps of Engineers. The taking of private property for public use cannot rightfully be termed a regulation within the proper scope of the Corps' powers under the Rivers and Harbors Act. Zoning regulations, frequently upheld regardless of the degree of restrictiveness, never extend as far as this decision; they may restrict a property owner's use, but they do not force that owner to let everyone else use his land at no cost to them or the government.

Kaiser Aetna and those authorized to use Kuapa Pond are being required to bear an unreasonable and unconscionable proportion of the expense for maintaining what the injunction will transform into a public recreational facility. Private parties, including petitioners, have paid the development costs of Kuapa Pond. Funds generated from marina lot lessees, certain other parties authorized by the fee owner and petitioner to use Kuapa Pond, and Kaiser Aetna continue to be the only source of payment for costs incurred in maintaining the waterways. Maintenance dredging and the removal of floating debris are consistently required. The long-range, comprehensive plan for development of the Kuapa Pond area was based upon control by petitioners of access to the pond and making agreements

with third parties for funding the continued maintenance of the waterways.

Kuapa Pond requires maintenance in order to keep the waterways open, safe and free from obstruction and debris. The Corps of Engineers has acknowledged that it has no funds available to provide this service nor any plans to seek or allocate funds in the foreseeable future. The only alternative is for the private parties to continue their contractual obligations to maintain an area which no longer has controlled access, but is a public playground. Save for the Ninth Circuit, the petitioners are unaware of any court decision, which, in effect, holds that:

(a) Federal regulation of activities within a private pond or marina necessarily imposes a public navigation servitude; *and*

(b) The private owners and their authorized users must subsidize public use if the pond or marina is to be properly maintained.

*United States v. Appalachian Electric Power Co., supra; The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672 (D.N.J. 1973), *aff'd*, 498 F.2d 597 (3rd Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); and *Weiszmann v. Dist. Eng., U.S. Army Corps of Eng.*, 526 F.2d 1302 (5th Cir. 1976); cited by the Ninth Circuit, do not so hold.

The decision of the Ninth Circuit violates due process in that the injunctive relief granted results in a confiscation of private property without compensation. It is no answer for the Ninth Circuit to say that since the petitioners caused the waters of the pond to be navigable that they thereby assumed, albeit unwittingly, the burden of

public access. Such a simplistic answer ignores (1) settled Hawaiian law of ancient origin, (2) fundamental federal principles respecting property rights vested upon territorial annexation, (3) the separability of the concepts of public access and regulation, (4) practical economic hardships caused by requisite ongoing maintenance, and (5) the fifth amendment prohibition against taking private property for public use without just compensation. The decision serves to create a public water playground at the financial, environmental and aesthetic expense of the marina lot lessees and petitioners.

## CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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## Appendices

**APPENDIX A**

**Opinion of the Ninth Circuit Court of Appeals**

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 76-2400

UNITED STATES OF AMERICA,

*Plaintiff-Appellant,*

—vs.—

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN,  
JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKA-  
BUKI, MYRON B. THOMPSON, Trustees of the Bernice P.  
Bishop Estate; HAWAII-KAI DEVELOPMENT Co.,

*Defendants-Appellees.*

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No. 76-1968

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—vs.—

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN,  
JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKA-  
BUKI, MYRON B. THOMPSON, Trustees of the Bernice P.  
Bishop Estate; HAWAII-KAI DEVELOPMENT Co.,

*Defendants-Appellants.*

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## OPINION

On Appeal from the United States District Court for the  
District of Hawaii

Before:

MERRILL, CUMMINGS,\* and SNEED,

*Circuit Judges.*

MERRILL, *Circuit Judge:*

Cross-appeals have been taken from judgment of the district court. The United States, as plaintiff, has secured a declaratory judgment establishing that the waters of Kuapa Pond on the Island of Oahu, Hawaii, are navigable waters of the United States, and that under §10 of the Rivers and Harbors Act, 33 U.S.C. §403 (1970),<sup>1</sup> the owner and the lessee of underlying and surrounding lands must obtain authorization from the Army Corps of Engineers for any future construction, excavation or filling affecting the pond. The owner and the lessee of the underlying and surrounding land have taken an appeal from that judgment. The United States also sought to establish that public access must be accorded to the pond as navigable water of the United States. An injunction was sought to prevent the owner and lessee from denying public access and to require them to notify the public of the fact of the pond's accessibility. The district court ruled against the United States on this claim and the government has appealed from that judgment. The decision of the district court appears *ta* 408 F.Supp. 42 (D. Hawaii 1976), and contains an excel-

\* Honorable Walter J. Cummings, United States Circuit Judge of the Seventh Circuit Court of Appeals, sitting by designation.

<sup>1</sup> Section 403 in general makes it unlawful, in absence of approval of the Army Corps of Engineers, to create an obstruction to the navigational capacity of any of the waters of the United States, build structures in such waters or excavate or fill so as to alter or modify the course or capacity of such waters.

lent discussion of Hawaiian history as it bears on the nature of water bodies such as Kuapa Pond.

The pond is contiguous to Maunalua Bay, which is without question navigable water of the United States. Until 1961, the pond was a fishpond and its waters were used exclusively for the taking of fish. It covers 523 acres and extends inland from Maunalua Bay a distance of approximately two miles. The nature of such ponds was recently discussed by the Hawaii Supreme Court in *In-re Keohokalani Kamakana*, — Hawaii —, — P.2d — (1978). In footnote 2 the court states:

"Fishponds, both along the shore and inland, were part of a complex aquaculture system developed in pre-historic Hawaii. Although fishponds existed elsewhere in Polynesia, in Hawaii they were widespread and included numerous man-made and natural enclosures of water in which fish and other products were raised and harvested. Hawaiian aquaculture's distinctive feature was the sluice grate with its associated sluice. This grate was stationary, with no moveable parts, and allowed the Hawaiians to progress from tide-dependent fishtraps to artificial fishponds which could be controlled at all times of the tide. *See generally*, R. Apple and W. Kikuchi, *Ancient Hawaiian Shore Fishponds: An Evaluation of Survivors for Historical Preservation* (1975); M. Kelly, *Loko I'a O He'eia* (Bishop Museum, 1975).

Kanoa fishpond is classified as a *loko kuapa*, a fishpond of littoral water whose side or sides facing the sea consist of a stone or coral wall usually containing one or more sluice grates."

Kuapa Pond's private ownership dates from the Great Mahele or royal land division of 1848. By that division

large land units, known as "ahupuaa," extending from the volcanic mountains of the interior (which are characteristic of each island) outwardly to the sea were granted by King Kamehameha III to his chiefs. Kuapa Pond was part of an ahupuaa that eventually vested in Bernice Pauahi Bishop and on her death formed a part of the trust corpus of the Bishop Estate, the present owner. As was the case with Kanoa Fishpond in *In re Kamakana*, Kuapa Pond, from time immemorial, was separated from the bay by a sandbar and coral wall, with sluice gates permitting the pond to enjoy the enriching effects of tidal action but with no navigable access to Maunalua Bay. During the early 1900's a roadway was built along the sandbar and reinforced with coral, and bridges were built over the sluice gates.

In 1961, the Bishop Estate leased a 6,000-acre area to Kaiser Aetna for subdivision purposes, and the subdivision known as "Hawaii-Kai" resulted. Kuapa Pond was included in the lease. Under the agreement Kaiser Aetna dredged and filled parts of the pond. Accommodations for pleasure boats were created. The sluice gates were eliminated and the bridges were elevated to allow clearance of 13½ feet over mean water level. Below the bridges a channel was dredged to a depth of 8 feet. The average depth of the pond itself was increased from the fishpond depth of 2 feet to a depth of 6 feet. The pond, so improved, is now known as "Hawaii-Kai Marina." There were, at the time of trial, approximately 1500 marina waterfront lot lessees, all of whom for a fee could procure marina privileges, including pleasure boat use of the pond and access to and from the bay. In addition, some 56 nonresident boat owners for a fee were permitted to moor their boats in the marina and enjoy marina privileges.

Kaiser Aetna controlled access to and use of the marina. Commercial use was not permitted, except for a small vessel, the Marina Queen, which could carry 25 passengers and was used for about 5 years for the purpose of promoting sales of marina lots and for a brief period was used by marina shopping center merchants for promotional purposes.

### *Appeal of Kaiser Aetna and Bishop Estate*

Kaiser Aetna and Bishop Estate challenge the district court's holding that Kuapa Pond was navigable water of the United States. There can be little question but that Hawaii-Kai Marina has been rendered navigable by the improvements made by Kaiser Aetna.<sup>2</sup> Over 600 boats enjoy its mooring and fueling facilities, and regularly use the marina as a waterway to Maunalua Bay and the Pacific Ocean. Kaiser Aetna contends, however, that since the waters were privately owned and have never been used in interstate commerce, the marina cannot be held to be navigable water of the United States.

The source of the government's authority over waters was noted in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-05 (1940), where the Court stated:

"The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. 'The Congress shall have Power . . . To regulate Commerce . . . among the several States.' It was held early in our history that the power to regulate commerce nec-

<sup>2</sup> We accept, arguendo, the contention of Kaiser Aetna that Kuapa Pond in its natural state was not navigable; that although it was subject to the ebb and flow of the tide, that test determines the outer limits of an admittedly navigable water body and does not serve to render navigable a separate and distinct water body not otherwise navigable.

essarily included power over navigation. To make its control effective the Congress may keep the 'navigable waters of the United States' open and free and provide by sanctions against any interference with the country's water assets."

And, later:

"We are dealing here with the sovereign powers of the Union, the Nation's right that its waterways be utilized for the interests of the commerce of the whole country."

*Id.* (footnotes omitted).

The term "navigable water of the United States" was defined in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), where the Court held:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

Elaborating on this definition, the Court in *United States v. Appalachian Power Co.*, *supra*, held that "it is proper

to consider the feasibility of interstate use after reasonable improvements which might be made" in determining whether a water is navigable, 311 U.S. at 409. Thus, the factual inquiry is whether the water "has 'capability of use by the public for the purposes of transportation or commerce'." 311 U.S. at 410. The feasibility of use in interstate commerce can be demonstrated by the existing use of the waterway by private boats for personal use, as the Court stated:

"Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."

311 U.S. at 416.

To the same effect is *Weiszmann v. Dist. Eng., U.S. Army Corps of Eng.*, 526 F.2d 1302, 1305 (5th Cir. 1976), where the court held:

"There is no requirement that a body of water sustain actual commerce in order to meet the test of navigability. Rather, the mere capability of commercial use of a body of water suffices, even if such commerce could be made possible with artificial aids." (citations omitted).

Kaiser Aetna contends, however, that despite the marina being navigable in fact and demonstrably suitable for commercial use, regulations of the Army Corps of Engineers preclude its being held to be navigable water of the United States. 33 C.F.R. §209.260(g) reads as follows:

"(g) *Improved or natural condition of the water body.* Determinations are not limited to the natural or original condition of the water body. Navigability

may also be found where artificial aids have been or may be used to make the water body suitable for use in navigation.

(1) *Existing improvements: Artificial water bodies.*

(i) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above; that is, whether the water body is capable of use for purposes of interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce \* \* \*."

Kaiser Aetna reasons from this language that since Kuapa Pond was not navigable in its natural state but was artificially rendered navigable, and since it is open to navigable waters of the United States at one end only and does not, in fact, support commerce, under the regulation it does not constitute navigable water of the United States.

The government responds: "The short answer is that this portion of the regulations has absolutely no bearing here because Kuapa Pond is not an 'artificial water body.' It is artificially *improved* but not artificially *created*."<sup>3</sup> We do not find this construction unreasonable and have been cited to no authority construing the regulations otherwise.<sup>4</sup>

<sup>3</sup> Brief of the United States as cross-appellee, pages 14-15.

<sup>4</sup> The government claims support from *United States v. Sexton Cove Estates Inc.*, 526 F.2d 1293, 1299, n.14 (5th Cir. 1976).

On its face, if its purpose is to limit jurisdiction of the Corps, the regulation is not clear. It states at one point: "The test is generally as stated above, that is whether the water body is capable of use for purposes of interstate commerce." This would appear to cover the marina. The portions of the regulation on which Kaiser Aetna relies deal with canals and apply here only by analogy. To apply those portions here would be to hold that the government voluntarily has surrendered jurisdiction of the Corps with respect to improved natural water bodies in all cases save those where the water body in fact supports interstate commerce, and this despite the government's protest against such construction of its regulation and despite the generous provisions of the Rivers and Harbors Act as construed by the Supreme Court. Under the circumstances we shall not hold the Corps to such a construction of its regulations.

For the reasons set forth by the district court in its opinion, *supra*, 408 F.Supp. at 54-55, we agree that the Corps' acquiescence in Kaiser Aetna's improvements cannot result in the government being held estopped to contend that the marina is navigable water of the United States.

We conclude that under *The Daniel Ball*, *supra*, and *Appalachian Power Co.*, *supra*, the Hawaii-Kai Marina was navigable water of the United States and within the regulatory control of the United States under the Rivers and Harbors Act.

*Appeal of the United States*

It has been emphasized by Kaiser Aetna throughout these proceedings that under Hawaii property law the fishpond as a fishpond—the submerged land together with the

waters of the pond—constitutes a unit of property unlike any known to the continental United States; that it has the property characteristics of fast land and is not subject to a navigational servitude.

The district court agreed. While holding that Kuapa Pond was navigable water of the United States, it ruled that the pond “was never servient to any ‘navigation servitude;’ it was always the legal equivalent of fast land for property and ‘navigation’ purposes. Therefore, its owners had the right to exclude the public therefrom \* \* \*.” 408 F.Supp. at 52.

The court concluded:

“[W]hile Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed waterway without paying a reasonable compensation for the use thereof.”

408 F.Supp. at 54.

In this we hold that the court was in error.

We note first that Kuapa Pond lost its fishpond characteristics and ceased to exist as a fishpond when it was transformed into a marina. Even fast land appurtenant to a waterway can by excavation be submerged and rendered a part of the waterway and should this occur the land loses its character as fast land and takes on the character of submerged land. *Weiszmann v. Dist. Eng. U.S. Army Corps of Eng., supra*, 526 F.2d 1302, 1305 (5th Cir. 1976); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). Thus, even if the pond as such is considered to be the “legal

equivalent of fast land” under state law, when it was converted into a marina and was made navigable in fact it took on the character of a waterway.

Further, we disagree with the manner in which the district court has resolved the problems presented by the conflict between federal and local law respecting property rights and servitudes.

In the first place, in our judgment, federal regulatory authority over navigable waters (which the district court recognized to exist) and the right of public use cannot consistently be separated. It is the public right of navigational use that renders regulatory control necessary in the public interest.

Secondly, the federal navigational servitude and the public right of use are not imposed or appropriated by action of the government in the nature of seizure. They exist as characteristics of all navigable waters of the United States. *United States v. Rands*, 389 U.S. 121, 122-23 (1967); *United States v. Chicago, M., St.P. & P. R.R.*, 312 U.S. 592, 595-97 (1941). Land underlying navigable water differs from fast land in its servient characteristics which result from the dominant property characteristics of the navigable water by which it is submerged. If fast land is to be subjected to public use for transportation, it must voluntarily be dedicated to the public by the owner, or must be acquired by the public with due compensation to the owner. But land underlying navigable water underlies an existing public roadway. By virtue of the water's presence it is burdened with a public servitude. If the water body is interstate or forms part of an interstate waterway the navigational servitude runs to the federal government.

Hawaii property law at most relates to any servitude the state may claim. If the state chooses to relieve land under-

lying fishponds such as Kuapa Pond from any navigational servitude otherwise owing to the state (even after the pond's transformation into a marina), that is the state's business. The effect of Hawaii law on state rights, however, is not before us. No matter what those rights may be they can have no effect on the federal interest in interstate commerce nor the rights and obligations of the federal government in this respect under the Constitution. When the waters of the pond became navigable waters of the United States, the federal navigational servitude attached.

On the appeal of Kaiser Aetna and the Bishop Estate, judgment of the district court is affirmed. On the appeal of the United States, judgment is reversed and the matter is remanded for entry of judgment in favor of the United States.

## APPENDIX B

### Opinion of the United States District Court for the District of Hawaii

#### IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

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UNITED STATES OF AMERICA,

*Plaintiff,*

—vs.—

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., ATHERTON RICHARDS, HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, trustees of the Bernice P. Bishop Estate; KAISER HAWAII-KAI DEVELOPMENT CO.,

*Defendants.*

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#### DECISION

The United States, for its Corps of Engineers, asks for a declaratory judgment and injunctive relief, seeking a declaration that the waters of Kuapa Pond, now more generally known as Hawaii-Kai Marina, are navigable waters of the United States, and that defendants must obtain authorization from the Corps for any future construction, excavation or filling in the marina, in accordance with § 10 of the Rivers and Harbors Act, 33 U.S.C.A. § 403 (1970). Plaintiff also requests that this court enjoin the defendants from interfering in any way with public access to the waters of the marina as well as mandate defendants to publicize that fact.

Hawaii-Kai Marina is situated wholly on property owned in fee simple by defendant Bishop Estate. In 1967 the Estate leased the property within which was Kuapa Pond to Kaiser-Aetna interests, which began dredging and filling the pond in order to create the present marina, now a part of a larger and surrounding development known as Hawaii-Kai.

Plaintiff asserts that the marina is navigable water of the United States under two alternative theories: Kuapa Pond was navigable in its natural state and did not lose that status by dint of the subsequent development, or the subsequent development by defendants rendered the pond navigable. The Corps informed Kaiser-Aetna in 1972 that it considered the pond to be navigable water, whereupon the defendants applied for § 10 permits without admitting the navigability of Kuapa Pond.

Defendants deny that the pond is a navigable water of the United States and also raise several affirmative defenses: First, prior to 1972 the Corps did not require permits because it considered the waters to be private, thereby creating a form of estoppel to this action; second, a governmental declaration that the waters of the marina are public navigable waters of the United States is a taking of private property for public use without just compensation, in violation of the Fifth Amendment; third, since the quality of the marina waters will be harmed by public use, the administrative determination that the waters are navigable is a major federal action significantly affecting the human environment, for which the Corps has failed to file an environmental impact statement under 42 U.S.C.A. § 4332(2)(c) (1973).

Due to the potential impact of the resolution of the legal issues of this case upon numerous other fishpond properties in Hawaii,<sup>1</sup> the court invited parties with inter-

<sup>1</sup> Kuapa Pond was used as a fishpond prior to development, as more fully set forth later in the decision. The Corps of Engineers compiled a list of 142 fishponds throughout the state.

ests in other ponds to appear as *amici curiae*. The case was tried without a jury upon stipulations by the parties, submission of exhibits, and testimony of witnesses.

## FINDINGS OF FACT

### I. *The pre-development fishpond*

Kuapa Pond covered 523 acres and extended approximately 2 miles inland from Maunalua Bay and the Pacific Ocean on the island of Oahu, Hawaii. The pond was contiguous to Maunalua Bay, the latter being navigable water of the United States.

A not uncommon barrier beach delineated Kuapa Pond from the bay. The area probably was a stream mouth prior to the end of the ice age, at which time the rise in sea level caused the shoreline to retreat from a position that is now submerged by Maunalua Bay, and is marked by the reef edge. Partial erosion of the headlands adjacent to the bay formed sediment which accreted to form the barrier beach at the mouth of the pond, creating a lagoon.

Early Hawaiians used that lagoon as a fishpond and reinforced the natural sand bar with stone walls where the tidal flows in and out of the ancient lagoon occurred. Approximately two-thirds of the pond's water came from the sea. Runoff waters from the surrounding mountains provided the balance. Part of the seawater present in the pond percolated through the barrier beach. As indicated above, for the area's use as a fishpond the barrier was incomplete in its normal state. Wave and tidal action from the sea and occasional heavy fresh water flow breached the sand barrier and allowed the ocean tides to flood the pond.

Recorded history prior to annexation of Hawaii and geological evidence indicate two openings from the pond to Maunalua Bay. The fishpond's managers placed removable sluice gates in the stone walls across these open-

ings. During high tide, water from the bay and ocean entered the pond through the gates. During low tide, the current flow reversed toward the ocean.

The Hawaiians utilized the tidal action in the pond to raise and catch fish, primarily mullet.<sup>2</sup> During ebb tides, the sluice gates allowed water but not large fish to escape, thus "flushing" and enriching the pond while preserving the crop. Water depths in the pond varied up to 2 feet at high tide. Large areas of land at the inland end were completely exposed at low tide. The fishermen harvested the pond with the aid of shallow-draft canoes or boats, but the barrier beach and stone walls prevented boat travel directly therefrom to the open bay.

Kuapa Pond, with other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government. Most fishponds were built behind barrier beaches, such as Kuapa Pond, or immediately seaward of the land controlled by the *alii*, or chiefs.<sup>3</sup> By imposing a tabu on the taking of the fish from a pond, the chief alone determined the allotment, if any, of fish, just as he distributed the other crops among his sub-chiefs, land agents, and vassals. The fishpond was thus an integral part of the Hawaiian feudal system. Chiefs gave land, including its fishponds, to sub-chiefs, or took it away at will. Any fishponds in conquered chiefdoms became the personal property of the conquering high chief and were treated in

<sup>2</sup> Although some small fry entered the pond with the tidal flux, Hawaiian aquaculture depended upon seeding the pond with fry caught in nearby bays, because mullet spawns only in seawater, not in the brackish water of the pond.

<sup>3</sup> A *loko kuapa* is a fishpond of littoral water created by construction of a stone wall across a side or sides facing and having access to the sea. When what is primarily a barrier-beach type pond needs a stone wall to separate the pond from sea action it is referred to as a *loko kuapa*. Such was Kuapa Pond.

the same manner the high chief treated all newly subjugated lands and appurtenances. The commoner had no absolute right to fish in the ponds, nor in the sector of ocean adjacent to the chief's land—all such rights were vested in the chiefs and ultimately in the king, alone.

In 1848, King Kamehameha III pronounced the Great Mahele, or national land distribution. Any fishponds therein were allotted as part or inholding of the *ahupuaa* (a land/water unit). Titles to fishponds were recognized to the same extent and in the same manner as rights were recognized in fast land. Kuapa Pond was within the land of a Royal Patent, pursuant to the Great Mahele, with title eventually vesting in Bernice Pauahi Bishop and thence in defendant Bishop Estate.

During the early 1900's, Kalaniana'ole Highway was constructed upon and along the sand bar which separated Kuapa Pond from Maunaloa Bay and the Pacific Ocean. Coral fill was placed on top of the sand bar to provide a foundation for the highway. Highway bridges were made over the waterways between the two sluice gates of Kuapa Pond and the bay. Always, until 1961, Kuapa Pond was solely used as a fishpond.

As indicated above, at all times the pond area was subject to the ebb and flow of the tides, excepting only any restraints created by the sluice gates.

## II. Post-development characteristics

In 1961 the Bishop Estate gave Kaiser-Aetna interests master subdivision housing-development rights to a 6,000 acre area known today as Hawaii-Kai. The lease included the Kuapa Pond area, and the agreement contemplated that Kaiser-Aetna would dredge and fill parts of the pond, erect retaining walls, and build bridges within the development to create what is now the Hawaii-Kai Marina. Upon notice

to the Corps of Engineers, defendants were told that no permits were needed for their proposed developments and operations within Kuapa Pond.

Later, Kaiser-Aetna notified the Corps that it planned to improve the Kalanianaʻole Highway bridge to a maximum clearance of 13.5 feet over mean sea level, and dredge a channel below it to a depth of 8 feet, to allow boats from the marina to enter into and return from the bay, as well as to provide better drainage of the marina waters. The Corps acquiesced in the developers' proposals,<sup>4</sup> its chief of construction commenting only that the "deepening of the channel may cause erosion of the beach."<sup>5</sup>

Construction of the Hawaii-Kai subdivision and marina proceeded as planned and there are now approximately 22,000 residents therein. The average depth of the marina is now 6 feet, with a main channel of 8 feet. Since development of the marina, 668 boats have been registered and authorized to use the pond. Kaiser-Aetna oversees the operations of the marina and has generally excluded all "commercial" vessels, although it has not yet decided whether or no [*sic*] businesses in the shopping center that abuts the marina may operate commercial vessels.

Kaiser-Aetna owns and operates a small vessel within the marina, the "Marina Queen", which can carry up to 25 persons. During 1967-72, Kaiser-Aetna operated the Marina Queen primarily to show Hawaii-Kai to possible subdevelopers and purchasers of homes or homesites. On Sundays, they invited the general public to join the cruises.

<sup>4</sup> The record indicates no response to a letter from D. M. Snow, Project Engineer for Kaiser-Aetna, to the Corps of Engineers (Defendants' Exhibit 15) which stated: "It is our understanding that no separate federal permit will be required for this construction, and that there will be no requirement for public use or control of any waters on the Kuapa Pond side of the bridge."

<sup>5</sup> Defendants' Exhibit 14.

During 1973, the marina shopping center merchants' association took over operation of the Marina Queen. The ship ran six or seven times a day for the purpose of attracting people to the marina shoreside and adjoining shopping facilities. As a part of the general promotion, Kaiser-Aetna chartered buses to pick up tourists at various points in Waikiki and transport them to the marina area. The tourists were given a special package of shop discounts and a ride on the Marina Queen, for which they paid \$1 and later \$2 per person for the package. During this period, 18,254 tourists and a total of 38,821 persons rode the Marina Queen. The boat ride was available without charge to anyone who came to the marina.

The promotion ended in early 1974, and Kaiser-Aetna now uses the Marina Queen for promotion of real estate sales and for school groups on request. The Marina Queen has operated at all times solely within the waters of the marina.

Every marina-lot lessee has a non-exclusive easement with the trustees of Bishop Estate, which still owns the fee, for purposes of navigation across Kuapa Pond and access to Maunalua Bay. Approximately 1,500 lots front the marina, and their lessees pay \$72 annually for maintenance of the pond.<sup>6</sup> In addition, at least 86 Hawaii-Kai but non-marina lot lessees pay \$72 annually for boating privileges of the marina, and 56 boat owners who are not residents of the Hawaii-Kai subdivision pay the same fee for the right to moor their boats in the marina and travel across it into Maunalua Bay.<sup>7</sup>

<sup>6</sup> Natural accretion tends to block up the artificial channels. Development dredging ended in 1970. During 1972-73 the first maintenance dredging took place at a cost of \$160,000 to the defendants.

<sup>7</sup> Subsequent to the trial, the court requested that defendants provide information about the use of the marina by nonresidents. They submitted it in the form of a post-trial stipulation of facts,

Since the channel connecting the marina and the bay is unobstructed, the marina waters are subject to the ebb and flow of the tides.

#### CONCLUSIONS OF LAW

##### I. Introduction

The concept of "navigable waters" grew out of the "public common of piscary," i.e., the right of the common people of England to travel upon the waters and to fish them. Under English common law, the crown owned the beds of all navigable waters affected by the ebb and flow of the tide. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 411-13 (1842). When the American Revolution took place, the states succeeded to all rights and powers of the Crown. Thus they held title to the beds and control over public use of all navigable waters within their respective boundaries.

Upon ratification of the Constitution, jurisdiction over the surface of navigable waters used in interstate commerce passed to the federal government under the Commerce Clause. Jurisdiction over the surface of navigable waters lying wholly within a single state, and not connecting with other waters to form a navigable highway of interstate commerce, remained with the situs state. *Id.* at 410.

Subject to exceptions to be discussed below, the same federal-state rights of jurisdiction and title generally applies to states admitted to the Union after the original 13,

into which plaintiff refused to enter. The court accepts the declaration of defendants as the Court's Exhibit 1 over plaintiff's objection, as an admission against interest of fact.

The proposed post-trial stipulation also indicates that 86 non-marina lot lessees are using the pond rather than 175. While the government did not agree to the stipulation, the court will accept the "86" figure as a minimum number.

the underlying theory being that the United States acquired lands and held them in trust for future states so that they could be admitted on an equal footing with the original states. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

The term "navigability" has many legally distinct applications. (1) It may determine *title* to river and lake beds.<sup>8</sup> (2) It has been the touchstone of Congressional *jurisdiction* over waters via the Commerce Clause.<sup>9</sup> (3) It embodies the *navigation servitude*, a modern declaration of the common law right of public access to the surface of waters. In addition, (4) admiralty jurisdiction in federal courts flows from the general concept of navigability.<sup>10</sup> The use of the term "navigability" for these four purposes, however, does not necessarily mean that each is co-extensive with the other. See *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940). Therefore any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of "navigability" was invoked in a particular case. In this suit, plaintiff is seeking a determination that the Hawaii-Kai Marina is within Congressional jurisdiction as exercised and implemented by the Rivers and Harbors Act, and that the waters of the marina are subject to the navigation servitude.

<sup>8</sup> *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596 (1941); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1865). *Utah v. United States*, 403 U.S. 9 (1971).

<sup>9</sup> *Arizona v. California*, 283 U.S. 423, 454-57 (1931) (the navigation power sustains Congressional authorization of the Hoover Dam); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940) (federal power to license private hydroelectric projects); *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960) (approving federal flood control project on nonnavigable tributary because it is related to flood control on navigable streams).

<sup>10</sup> *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

## II. Navigability of Kuapa Pond in its natural state

If Kuapa Pond was navigable water of the United States prior to its development by defendants, such development would not have destroyed that status, absent a specific Congressional abandonment of the waters, and the marina would, unquestionably, be subject to the public's right of access. See *Economy Light & Power Co. v. United States*, 256 U.S. 113, 124 (1921).

### A. Tests of navigability

Of the several tests of navigability for purposes of public access to surface waters in the United States, the most common one had its genesis in cases dealing with admiralty jurisdiction and the Commerce Clause power.<sup>11</sup> The pronouncement in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), while not involving seawaters, is generally applied: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact." Anent that statement, one expert has observed that "a navigable river is any river with enough water in it to float a Supreme Court opinion."<sup>12</sup> Although Kuapa Pond floated shallow-draft boats for fishing purposes, one crucial element of the government's case was certainly missing prior to the transformation of the pond into the Hawaii-Kai Marina, viz., navigation in interstate commerce.<sup>13</sup>

<sup>11</sup> *Propeller Genessee Chief*, *supra*, n. 10; *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

<sup>12</sup> C. Meyers & A. Tarlock, *Water Resource Management* 240 (1971).

<sup>13</sup> "And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball*, *supra* n. 11 at 563.

There is no evidence that the barrier beach and the pond's stone walls ever admitted the possibility of even the shallowest boats floating directly from Kuapa Pond to the open bay.

The government, however, maintains that the principle established in *United States v. Appalachian Electric Power Co.*, *supra*, applies here, viz., that a waterway must also be considered to be navigable in law if reasonable improvement would render it navigable in fact.<sup>14</sup> Thus, an inquiry under *Appalachian* must focus on Kuapa Pond in its natural state and entail a comparison of the cost of improvement with need.<sup>15</sup> However, the government has presented no evidence on the subject, other than that the marina may now be or may be made susceptible to interstate commerce.<sup>16</sup> The mere fact that the defendants decided that it was reasonable for them to spend the money necessary to develop Kuapa Pond into a marina as a recreational body of water *adjunct* to its private residential subdivision, for the apparent purpose of enhancing the property value of homesites thereon and about, does not

<sup>14</sup> The law of *Appalachian* does not necessarily help the plaintiff with respect to its navigation servitude claim because that case dealt only with Congressional power to assert its Commerce Clause jurisdiction for purposes of licensing private power plants. See 311 U.S. at 407-08.

<sup>15</sup> As observed in *Appalachian*, *supra*, at 407-08: "[T]here are obvious limits to [the cost of] such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful." See also *United States v. Rio Grande Irrigation Co.*, 9 N.M. 292, 299, and 174 U.S. 690, 699 (1899).

<sup>16</sup> The government presented evidence, rebutted by defendants, that *further* reasonable improvements of the marina would render it susceptible to additional forms of commerce. *Appalachian* is not directly in point on any such separate second stage of improvements. To have the *Appalachian* doctrine apply, the first stage and second stage together would have to be found economically reasonable at the inception of the project.

lead, per se, to the conclusion that it was ever financially reasonable to develop Kuapa Pond into a highway just for interstate commerce by water.

A third test of natural-state navigability has been applied in several federal courts in recent years,<sup>17</sup> viz., the "ebb and flow" test. Under this test, expressly adopted by the Third Circuit in *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 605-06, 610 (1974), estuarine tidal areas which are regularly inundated by the mean higher, high tide<sup>18</sup> are subject to the federal navigation servitude.

As indicated above, unquestionably the Pacific tides ebbed and flowed over Kuapa Pond in its pre-marina state. Maps and surveys, as well as the bases of fishpond aquaculture, establish that there would have been at least a minimum basis for federal jurisdiction if the ebb and flow test could be applied, because some of Kuapa Pond was *always* inundated.<sup>19</sup> Therefore, if it were not for the unique legal status of Hawaiian fishponds such as Kuapa Pond as strictly private property, free and clear of any claim by the Crown either to the beds thereof or the waters

<sup>17</sup> *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 605-06, 610 (3d Cir. 1974); *United States v. Cannon*, 363 F.Supp. 1045 (D. Del. 1973); *United States v. Lewis*, 355 F.Supp. 1132 (S.D. Ga. 1973); *United States v. Baker*, 2 E.R.C. 1849 (S.D.N.Y. 1971); cf. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied 401 U.S. 910 (1971); *Tatum v. Blackstock*, 319 F.2d 397 (5th Cir. 1963); *United States v. Joseph G. Moretti, Inc.*, 331 F.Supp. 151, 156-57 (S.D. Fla. 1971). But see *Pitship Duck Club v. Town of Sequim*, 315 F.Supp. 309 (W.D. Wash. 1970); *North Am. Dredging Co. v. Mintzer*, 245 F. 297 (9th Cir. 1917).

<sup>18</sup> On the Pacific coast, the line of the mean higher, high tide is used instead of the mean high tide. See *United States v. California*, 381 U.S. 139, 175-76 (1965), modified, 382 U.S. 448, 449-52 (1966).

<sup>19</sup> Although plaintiff did not present evidence to establish the reach of the mean higher, high tide, areas that were historically always covered by water *a fortiori* are within the mean higher, high tide.

thereon under Hawaiian law prior to annexation, and their protection then and thereafter as such by statute and Constitution, application of the ebb and flow test would have established a public right of access to Kuapa Pond.<sup>20</sup>

#### B. *The effect of Hawaiian property law*

As indicated above, the status of fishponds from Hawaiian prerecorded history up through the Great Mahele of 1852 was clearly that of private property, appropriated by successive conquerors, and given by and to chiefs, with the commoners excluded from the lands, the pond waters and the fish therein, under every regime. The distribution of land in the Great Mahele made no change in the rights of private ownership of fishponds, as the Hawaii Supreme Court recognized in a series of pre-annexation cases.<sup>21</sup>

The Organic Act of 1900, following annexation, repealed all prior laws conferring private rights in *seawater* fisheries (subject to vested rights) but specifically exempted

<sup>20</sup> It cannot be doubted that where the federal government has a navigation servitude it also has jurisdiction for Commerce Clause purposes. See section III.A *infra*.

<sup>21</sup> *Haalelea v. Montgomery*, 2 Haw. 62 (1858); *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879); *Kapea v. Mochonua*, 6 Haw. 49 (1871); *Harris v. Carter*, 6 Haw. 195 (1877). Private ownership was so commonly accepted under the Monarchy that the issue was not raised directly in these cases. Dictum, under these facts, enhances rather than detracts from the strength of the legal precedents.

The Board of Commissioners to Quiet Titles was concerned solely with landed property, see *Carter v. Hawaii*, 200 U.S. 255, 257 (1906), and routinely included fishponds within its land awards or patents under the Great Mahele. In those awards or patents of land wherewith a fishpond was appurtenant, either the description or accompanying map or both showed the fishpond as part of the award. Haw. Att'y Gen. Op. No. 1689, at 460 (1939). For example, Kuapa Pond was not described separately but was included within the boundaries of the Royal Patent of the Land of Maunalua certified by the Oahu Commissioner of Boundaries, June 13, 1884.

fishponds from its scope."<sup>22</sup> A similar provision appears in the Hawaii Constitution, article X, § 3. Opinions since annexation and statehood confirm the private nature of fishponds in Hawaii."<sup>23</sup>

The United States Supreme Court has recognized the legitimacy of similar Hawaiian property rights in sea fisheries. *See Damon v. Hawaii*, 194 U.S. 154 (1904); *Carter v. Hawaii*, 200 U.S. 255 (1906). Justice Holmes delivered both opinions; in *Damon* the learned jurist wrote:

A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.

194 U.S. at 158. While, as indicated, these cases dealt with sea fisheries and not fishponds, they constitute a federal

<sup>22</sup> "All fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States . . . ." 48 U.S.C.A. § 506 (1952).

<sup>23</sup> *Murphy v. Hitchcock*, 22 Haw. 665, 669-70 (1915); *State v. Hawaiian Dredging Co.*, 48 Haw. 152 (1964); *Palama v. Sheehan*, 50 Haw. 298 (1968); Haw. Att'y Gen. Op. No. 1689 (1939); Haw. Att'y Gen. Op. No. 57-159 (1957).

*McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 187 (1973) (and now before this court) holding that "ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good," does not apply to claims of ownership to fishponds such as Kuapa Pond.

recognition of peculiar rights arising out of Hawaii's unique feudal system of property rights.

The theory that the federal government holds a stewardship over all navigable water in a United States territory prior to its being admitted to statehood (see section I *supra*), may be valid for lands obtained from a foreign government where there is no history of legally authorized private proprietorship over certain waters therein. Where, just as here under the Hawaiian Kingdom, property rights have been established by a government prior to purchase or annexation of the lands however, those private property rights survive if they are recognized in and by the instrument of annexation. For example, in *Knight v. United States Land Association*, 142 U.S. 161, 183-84 (1891), the federal government confirmed a title to tidelands which rested on the claim of the city of San Francisco as successor to the rights of a pueblo under a Mexican grant. The grounds for the decision were that the treaty of Guadalupe Hildago required the United States to protect property rights which had been created by the previous Mexican government, and in such event the doctrine of "equal footing" did not apply.<sup>24</sup>

The Act of Congress annexing the Hawaiian Islands recognized existing property rights by providing:

The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United

<sup>24</sup> There is nothing inconsistent between the Hawaiian law of private ownership of fishponds and the federal power over navigation because the latter was merely a surrender of jurisdiction by the states of powers inherited from the Crown or acquired by the "equal footing" doctrine—only to the extent the states had jurisdiction over waters to surrender. The Kingdom of Hawaii never claimed jurisdiction over fishpond waters. *See* n. 21 *supra*.

States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.<sup>25</sup>

Upon enacting comprehensive legislation for the governance of the territory, *i.e.*, the Organic Act, as noted *supra* Congress specifically exempted fishponds from any change in status. This same protection was placed in the Hawaii Constitution, which Congress approved as a prerequisite to admission of Hawaii into the Union.<sup>26</sup>

Kuapa Pond, therefore, was never subject to any "common right of piscary," and was never servient to any "navigation servitude;" it was always the legal equivalent of fast land for property and "navigation" purposes. Therefore, its owners had the right to exclude the public therefrom, at least and certainly until they began transforming the land (and pond) into the Hawaii-Kai subdivision development.

This court now turns to consideration of whether or no the transformation of the pond into the Hawaii-Kai Marina and its subsequent use has altered the owner's legal rights with respect to any federal control over the waters and the public use thereof.

### III. *Navigability and the navigation servitude of the Hawaii-Kai Marina in its present state and use*

#### A. *Navigability of the Hawaii-Kai Marina*

The government's claim of interstate commercial use of the marina seems to rely primarily upon the activities of the Marina Queen. Plaintiff's theory is that tourists trav-

<sup>25</sup> Act of July 7, 1898, 30 Stat. 750-51. As stated in note 24 *supra* and elsewhere in this decision, see section I *supra*, Hawaiian law of private ownership of fishponds is not inconsistent with the Constitution. None of the other exceptions to the recognition of existing property rights in the quoted sentence are applicable.

<sup>26</sup> Act of Mar. 18, 1959, Pub. L. No. 86-3, § 1, 73 Stat. 4.

eling in interstate commerce use the Marina Queen, albeit solely within the marina, as part of their journey. Any analogy to a *Yellow Cab*<sup>27</sup> type of commercial activity would be faulty, however, because in *Yellow Cab* the intrastate activity was a necessary link in an interstate chain of travel. Here it is merely a relaxing diversion that has *de minimis* impact on the interstate activities of tourists.<sup>28</sup>

There is other evidence, however, of current substantial use of the marina in interstate commerce. Defendants did not restrict use of the marina just to residents of Hawaii-Kai as an exclusive appurtenant to their lot purchase agreements, to permit them to launch their private recreational crafts into the marina's private waters, and enter Maunalua Bay by means of an artificial channel from the marina to the bay. Rather, Kaiser-Aetna also sells licenses to nonresidents to use the facilities of the marina for launching and mooring their boats, as well as use the marina waters as a highway by which to gain the open sea through the channel. By so doing, defendants transformed what was apparently conceived as a private recreational area into a combination harbor and canal available to any boat owner who was willing to pay the fee, subject only to the total use-capacity of the marina. Thus the

<sup>27</sup> *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) (intrastate transportation of passengers between train stations is part of the stream of interstate commerce sufficient to charge a violation of the Sherman Act).

<sup>28</sup> The *Yellow Cab* concept of "in commerce" as apparently never been applied by a court to establish federal commerce jurisdiction over navigation in waters artificially made navigable. *United States v. Underwood*, 344 F.Supp. 486 (M.D. Fla. 1972), dealt with a waterway that apparently was navigable in its natural state as a matter of law. *Utah v. United States*, 403 U.S. 9 (1971), dealt with navigability of the Great Salt Lake for title purposes. It was specifically rejected as an adequate test of interstate commerce, as Congress used the concept in the Rivers and Harbors Act, in *Hardy Salt Co. v. Southern Pacific Transportation Co.*, 501 F.2d 1156 (10th Cir. 1974).

marina is in fact used in interstate commerce both to raise revenue for Kaiser-Aetna and to transport residents and nonresidents by waterway into and out of Maunaloa Bay.

Federal admiralty jurisdiction has long been held to apply to artificial waterways that in fact form highways of commerce between different states or into foreign commerce, over which vessels actually pass.<sup>29</sup> Thus a privately owned waterway may come within the term "navigable waters of the United States" as used in § 10 of the Rivers and Harbors Act if it *in fact*<sup>30</sup> supports interstate commerce.<sup>31</sup> The federal government has an intense interest in the quantity and safety of commercial traffic moving in interstate commerce, whether over natural or artificial channels, and possesses the constitutional authority to regulate the same.

If therefore follows that the waters of the marina cannot now be considered to be private property in and upon which its owners may do as they please without any possible federal regulation. As used by the defendants, the

<sup>29</sup> The canal cases cited by plaintiff are not directly relevant to this court's inquiry because they deal with the scope of federal admiralty jurisdiction. For example, in *Ex Parte Boyer*, 109 U.S. 629 (1884), a canal was held to be within the admiralty jurisdiction, and "public water of the United States . . . even though the canal is wholly artificial, and is wholly within the body of a State, and subject to [the State's] ownership and control . . . ." *Id.* at 632. The analogy to the question of Commerce Clause power, however, is an apt one, as the Supreme Court has noted. See *United States v. Appalachian Elec. Power Co.*, *supra*, n. 9, at 408.

<sup>30</sup> The government urged a broader test of navigability, viz., susceptibility to commerce. However, the Corps of Engineers' regulations regarding navigability do not themselves adopt this test. See 33 C.F.R. 6 209.260(g)(1)(i), (iii) (1975), and Congress has no constitutional justification for acting until the private owner puts its property to work in interstate commerce.

<sup>31</sup> *Dow Chemical Co. v. Dixie Carriers, Inc.*, 330 F.Supp. 1304 (S.D. Tex. 1971), *aff'd* 463 F.2d 120 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972). See also 36 Op. Att'y Gen. 203 (1930).

marina has become the legal equivalent of a toll-charging canal or harbor and therefore subject to regulation by the Corps of Engineers under § 10 of the Rivers and Harbors Act.

This determination that the waters of the marina are subject to federal regulation, however, does not resolve all of the problems of this dispute.

#### B. Regulation versus full exercise of the navigation servitude

As indicated above, the dominant federal navigation servitude arises from the common law *public* right to pass over *naturally* navigable waters.<sup>32</sup> Because under common law no private property right exists in such waters, therefore there is no private "right" to be "taken" by government action.

Here, however, as stated above, there never existed any public rights in or to the waters of Kuapa Pond, nor did its transformation into the present marina, by private funding, create, *ipso facto*, any *public* rights therein or thereto.

As indicated by The Court in *Appalachian*, *supra*, when nonnavigable waters, previously private, are made suitable for navigation,

*navigability, for the purpose of the regulation of commerce, may later arise.* An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable.

311 U.S. at 408 (footnotes omitted, emphasis added).

Because it was dealing solely with Congressional power to regulate, and not with an assertion of public rights to

<sup>32</sup> For an example of the difficulties attending a determination of whether waters are "naturally navigable", see *Appalachian*, *supra*, n. 9, at 407-18.

travel on the water, the Court did not discuss the navigation servitude. The Court continued, however:

The plenary federal power over *commerce* must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing *power over commerce*.

*Id.* at 409 (footnotes omitted, emphasis added).

*United States v. Cress*, 243 U.S. 316 (1917), (cited in *Appalachian*), together with *Appalachian*, clearly indicate that private "fast" lands and waters when made navigable by improvements or which could be made navigable are subject to Congressional regulation. Nevertheless while Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed waterway without paying a reasonable compensation for the use thereof.

Here then, since Kuapa Pond has been transformed into navigable waters used in commerce, the marina has therefore become subject to regulation by Congress and within admiralty jurisdiction. It does not follow, however, that the United States can, without payment, appropriate those waters for *public* use and deprive the defendants of their investment or any return on it.<sup>33</sup>

<sup>33</sup> See also 36 Op. Att'y Gen. 203 (1930).

This court does not imply that it believes that the *Appalachian* Court would have required compensation if Congress had been engaged in a project to improve the New River for purposes of public travel. Recognized title to property, or absence thereof, would be a major factor in determining the issue. The physical

If the government wants the marina opened to free public use, the defendants must be paid. This the government has not done.

#### IV. Defenses

Defendants argue that acquiescence by the Engineers, who did not insist upon permits during the planning and development of Hawaii-Kai, should affect the resolution of this case.<sup>34</sup> The Corps' seeming indifference to the creation, construction and use and the potential effect thereof upon commerce does not constitute a waiver or estoppel, however, since the constitutional power of Congress over the navigable waters cannot be impaired or restricted by any officer in the executive branch of government.<sup>35</sup>

Defendants claim that the National Environmental Policy Act § 102(2)(c), 42 U.S.C.A. § 4332(2)(c) (1973), requires the Corps of Engineers to issue an environmental impact statement before taking administrative action to declare the marina a navigable waterway is without merit. NEPA does not apply here. The initial declaration by the Corps merely asserted the existence of its *jurisdiction* under existing legislation, which had long ago given to the Corps the regulatory power over navigation aspects of

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condition of the subject property would likewise be significant. At one extreme would be lands such as were the subject of *Cress*. At the other extreme would be a vast interstate river obstructed at only one point, by a few easily removable boulders. Compensation is required in the first case, but not necessarily in the second.

<sup>34</sup> Defendants' further argument, that the Engineers' prior lack of enforcement should limit the degree of injunctive relief available to the United States, see *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610-11 (3d Cir. 1974), is moot because of this court's ruling, *supra*, that the federal navigation power over privately constructed artificial highways of commerce does not extend to assertion of public navigation servitude without just compensation.

<sup>35</sup> *Montana Power Co. v. FPC*, 185 F.2d 491, 495 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951).

interstate commerce. Therefore, the Corps' recognition of the scope of its authority is not an "action" within the meaning of § 102(2)(c).<sup>36</sup>

#### CONCLUSION

The government's prayer for a declaration that Hawaii-Kai Marina is subject to § 10 of the Rivers and Harbors Act is GRANTED. The government's request for an injunction preventing defendants from denying public access to Hawaii-Kai Marina, and requiring them to notify the public of its accessibility is DENIED.

Plaintiff and defendants will submit proposed forms of the order.

Dated: Honolulu, Hawaii, February 6, 1976.

MARTIN PENCE

*United States District Judge*

<sup>36</sup> The Corps' initial declaration, when contested by defendants, is not dispositive of the issue. 33 C.F.R. § 209.260(b) (1975). Final determination of the question of navigability is made by the federal courts, which are not "agencies" for purposes of NEPA. See 5 U.S.C.A. § 551(1)(B) (1967). Preparation of an environmental impact statement and other procedures mandated by NEPA are not prerequisites to the Corps' determination, nor this court's finding that Hawaii-Kai Marina is a navigable waterway subject to federal regulation under the Rivers and Harbors Act.